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Essay

History and Legal Discourse: The Language of the New Legal History

*Samuel J. Astorino**

Since the 1950's, American legal history has been increasingly reoriented towards a new mode of historical analysis that primarily focuses on private common law subjects rather than on constitutional development. Aptly termed the "New Legal History" by scholars currently working in this field, its emphasis has dramatically shifted from the study of such subjects as the Supreme Court, biographies, histories of isolated historical periods, constitutional history and legal institutions, to the rules and doctrines of torts, contracts, property, and related common law themes. While it is difficult to set an exact date, this process of recasting legal history began to take shape by mid-1950's and certainly emerged as a distinctive historical school by the following decade.¹

The principal cause of this change in perspective appears to have been a growing conviction that traditional constitutional history has simply failed to accurately portray the role of law as an integral part of the social order. Following Karl N. Llewellyn and other legal Realists of the 1940's and 1950's, the new legal historians likewise concluded that constitutional analysis was arid, formalistic, and far-removed from the actual functions of the common law.² A true understanding of the law of the real world and its so-

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1. White, Book Review, 59 VA. L. REV. 1130 (1973) (reviewing FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973)), reprinted in WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 3 (1978); Billings, *Law in Colonial America: The Reassessment of Early American Legal History*, 81 MICH. L. REV. 953 (1983).

2. Scheiber, *American Constitutional History and The New Legal History: Complimentary Themes in Two Modes*, 68 J. AM. HIST. 340 (1981).

cial impact was possible, it was now theorized, only through an investigation of common law categories. In this context, Morton Horwitz has insisted that "constitutional law in America represents episodic legal intervention buttressed by a rhetorical tradition that is often an unreliable guide to the slower (and more often unconscious) processes of legal change in America."³ The New Legal History thereby constitutes both a response to the perceived impoverishment of constitutional law and an invigorating effort to explore the implications of the structure and substance of American law at its most basic level of operation. That is, legal historians can learn more about contract law at the turn of the century, for example, by dusting off Regional Reporters than by "pouring through casebooks on Constitutional Law."⁴

The pioneer of this New Legal History was J. Willard Hurst of the University of Wisconsin. Hurst and his students, particularly Lawrence Friedman, took the "social function of law" as the pivotal point of their research. Hurst's monumental study, *The Law and Conditions of Freedom in the Nineteenth Century* sought to "understand the law not so much as it may appear to philosophers but more as it had meaning for workaday people and was shaped by them to their wants and vision."⁵ Legal history comes from the bottom up,⁶ and the Regional Reporters, the repository of common law decisions, are the bottom. The "social function of law," moreover, means that economic forces in particular have exerted a compelling influence on legal change. While constitutional law is downgraded in importance because of its separation of law and politics, the New Legal History insists that the evolution of American law cannot be studied in isolation from attending social, political and

3. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* xii (1977).

4. Speziale, *The Turn of the Twentieth Century as the Dawn of Contract Interpretation: Reflections in Theories of Impossibility*, 17 DUQ. L. REV. 555, 559 n.14 (1979). Speziale borrows Horwitz's methodology. Scheiber, *supra* note 2, states that:

The essence of the field's problem, as many contend, is that scholarly interest in the traditional care of constitutional history—the doctrines and behaviour of courts—has been overshadowed by a distinctly different mode of investigation, one that is often termed 'the new legal history'. . . . The new legal history, taking the whole legal system as its province and stressing the interactions of change in law with socioeconomic developments, offers perspectives on American history in many vital respects, different from the perspectives of constitutional history.

Id. at 337.

5. J. HURST, *THE LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY* 5 (1956).

6. Hurst, *The Law in United States History*, in 104 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 60 (1960).

especially economic circumstances. The monographs produced by the Wisconsin School, as well as the work of scholars like Richard B. Morris, Leonard Levy, Carl Haskin, Harry Scheiber and Morton Horwitz, describe this evolution as "instrumentalist" or "redistributive" in the sense that subnational law demonstrates how lawyers helped to transform the United States from an agrarian to an industrial economy.⁷

The sharp criticisms posed by the New Legal History contributed significantly to the present crisis in the field of Constitutional History. Harry Scheiber has cogently identified the causes of this crisis: the impact of behavioralism and value-free analysis; the dwindling concern with law and history in the Academy; the rise of social history and corresponding subordination of law, policy and public affairs to concern for the private place; and the erosion caused by the New Legal History in its emulation of social history through an emphasis on private law doctrines. Finally, in its neo-Marxist form at least, the New Legal History holds that "Constitutionalism is nothing more than hypocrisy The classic constitutional values are seen as mere smokescreens that obscure exploitation."⁸

All this, of course, is familiar enough to legal historians. The crisis facing constitutional history and the characteristics of the New Legal History are topics that have engaged legal scholars in recent years. This essay, however, addresses a related issue which, it is

7. J. HURST, *THE LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 236 (1960). This is not to suggest that the new legal history, considered as a whole, is neo-Marxist in orientation. Although a full-scale history of the new school has not yet appeared in print, it is readily apparent that two wings have already appeared, representing both a neo-Marxist perspective and a consensus approach. Horwitz reflects the neo-Marxist position that American legal history, at least in the nineteenth century, portrays a conflictual-exploitive pattern. See Horwitz, *The Rule of Law: An Unqualified Good?*, 86 *YALE L.J.* 561 (1977); Genovese, Book Review, 91 *HARV. L. REV.* 726 (1978) (reviewing M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977)); Horwitz, *The Conservative Tradition in the Writing of Legal History*, 17 *AM. J. LEGAL HIST.* 275 (1973); *THE POLITICS OF THE LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982). One of the best neo-Marxist statements on American law is Tushnet, *A Marxist Interpretation of American Law*, *MARXIST PERSPECTIVES: A JOURNAL OF HISTORY AND CULTURE* (Spring 1978). Hurst, on the other hand, while recognizing the importance of economic factors, insisted that "the richness of America's past" cannot be fully explained by Marxist theory alone. See Hurst, Book Review, 21 *AM. J. LEGAL HIST.* 175 (1977) (reviewing HORWITZ, *supra* note 3). See also WHITE, *TORT LAW IN AMERICA, AN INTELLECTUAL HISTORY* 3 (1980). A thorough examination of this problem deserves further study and should be on any future agenda dealing with the new legal history.

8. Scheiber, *supra* note 2, at 334-38, suggests an ingenious approach that may bridge the chasm.

suggested, represents an equally formidable dilemma in the field: the ability of non-lawyer historians to adequately comprehend the technical nature of common law developments in order to be able to integrate the findings of New Legal History into general American history. On the one hand, the issue must be defined as one which tends to divide the academic competencies of lawyer-historians and non-lawyer historians. Is "lawyer's legal history"⁹ with its inherent conceptual legalese and terms of art susceptible to understanding by lay persons uneducated in the law? On the other hand, it forces the issue of the ultimate worth of the New Legal History's contribution to our general understanding of America's past. For if those contributions are to be fully utilized by non-lawyer historians, then it is imperative that the gap created by the technical nature of legal discourse be breached by scholars on both sides. Can the writing of American history be truly complete in the absence of substantial reference to the historiography of the new school?

Historians have made a great deal of progress in assimilating both the methodologies and findings of related disciplines, especially the social sciences. During the last several decades, which incidentally comprise an age of remarkable productivity, American history has been rewritten in terms borrowed from economics, sociology, anthropology and psychology. Even the mystifying science of statistical analysis has been let in the door and honored with its own title of cliometrics.¹⁰ Modification of the old political-diplomatic-economic approach to the past attests to the intellectual health and increasing sophistication of the discipline. But it is equally true, nevertheless, that the rather dramatic interpretations advanced by the New Legal Historians have been woefully neglected and have not yet been absorbed into the mainstream of American historiography.

Given the quality and quantity of work generated by the New Legal Historians, this is indeed strange. After all, for example, two of the stellar productions of the New School, Horwitz's *Transformation of American Law* and Friedman's *History of American Law*, have been in print since 1973 and 1977 respectively. Moreover, Horwitz's book was awarded the prestigious Bancroft Prize in American History in 1978, and his first chapter had previously appeared in one of the most reputable periodicals in American his-

9. The phrase belongs to Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 281 (1973).

10. The obvious reference is to R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS* (1974).

tory.¹¹ Yet the fact remains that none of the introductory textbooks in American history currently on the market have either incorporated the new work or cited them in their bibliographies. Invariably, the interpretation of economic expansion of antebellum America, as an illustration, has not yet been stretched far enough to incorporate changes wrought by the common law.¹² Horwitz may be incorrect in his conclusion that these changes were exploitive in nature, but it is simply wrong to totally ignore the established fact that judicial decision-making in that era was a substantial causative factor. But this is not surprising; in his own day, Hurst himself was afforded similar treatment by American historians.¹³

Efforts to understand the reasons for this failure to integrate must begin with a consideration of persistent objections leveled by non-lawyer-historians to the technical language employed by lawyer-historians. Traditional legal history, with its accentuated constitutional-political themes, has been largely comprehensible to professional historians and political scientists. In most respects, constitutional history is often taught as an exercise in political

11. Horwitz, *The Emergence of an Instrumentalist Conception of American Law*, 5 PERSP. AM. HIST. 287 (1971).

12. J. GARRATY, *THE AMERICAN NATION: A HISTORY OF THE UNITED STATES* (5th ed. 1983); R. WILSON, J. GILBERT, S. NISSENBAUM, D. SCOTT, C. EARLE & R. HOFFMAN, *THE PURSUIT OF LIBERTY: A HISTORY OF THE AMERICAN PEOPLE* (1st ed. 1984); T. BAILEY & D. KENNEDY, *THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* (7th ed. 1983); W. JORDAN, *THE UNITED STATES* (5th ed. 1982); G. TINDALL, *AMERICA, A NARRATIVE HISTORY* (1984); J. CONLIN, *THE AMERICAN PAST* (1984); M. NORTON, D. KATZMAN, P. ESCOLT, H. CHUDACOFF, T. PATTERSON & W. TUTTLE, *A PEOPLE AND A NATION* (1982); R. DIVINE, T. BREEN, G. FREDERICKSON & R. WILLIAMS, *AMERICA PAST AND PRESENT* (1984); B. BAILYN, R. DAVID, H. DONALD, J. THOMAS, R. WIEBE & G. WOOD, *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* (1981); R. KELLY, *THE SHAPING OF THE AMERICAN PAST* (1982); J. CARY & J. WEINBERG, *THE SOCIAL FABRIC, AMERICAN LIFE FROM 1607 TO 1877* (1983); Older texts such as S. MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* (1965), and J. BLUM, E. MORGAN, A. SCHLESINGER, K. STAMPP & C. VAN WOODWARD, *THE NATIONAL EXPERIENCE* (3d ed. 1973), also failed to incorporate the findings of Pound or Hurst.

13. The only textbook in American History to cite HURST, *supra* note 5, is C. DOLLAR, J. GUNDERSON, R. SATZ, H. NELSON & G. RICHARD, *AMERICA, CHANGING TIMES* (2d ed. 1982). But chapter eight of this text, entitled "Genesis of Industrial America," shows no appreciation of Hurst's work. See the statement by Flaherty, *An Approach to American History: Willard Hurst as Legal Historian*, 14 AM. J. LEGAL HIST. 222, 230, 234 (1970): "Willard Hurst's writings have suffered most from their apparent neglect by the legal and historical professions Where American legal history could once be ignored by American historians with a certain justification, such an excuse is no longer tenable." *Id.* In 1969 Lawrence Friedman wrote that "[t]he non-lawyer historians have no need to feel ashamed of their contributions Yet, it is true that historians have not paid legal history its due. Non-lawyer historians have probably been frightened by the tough and impenetrable surface of legal materials." Friedman, Book Review, 14 AM. J. LEGAL HIST. 277 (1969) (reviewing *ESAYS IN THE HISTORY OF EARLY AMERICAN LAW* (D. FLAHERTY ed. 1969)).

thought.¹⁴ The technical language of contracts, torts and property, on the other hand, is often regarded as a forbidding twilight zone to those who lack specialized education in law.

Historians are generally well-aware that the New Legal History has altered the conceptual foundations of their discipline, but for many who lack legal education, the language barrier often seems so insurmountable as to frustrate any efforts to achieve some semblance of clarity. Morton Horwitz, educated in both law and political science, summarized the problem by noting that because legal history has been "[w]ritten largely by lawyers, it has been stamped by lawyer-like concerns." In his view:

One of the most important characteristics of the writing of American legal—as opposed to constitutional—history, is that it has almost exclusively been written by lawyers. The study of the history of American law inevitably involves the mastery of technical, legal doctrine, which barring such distinguished and extraordinary, rare exceptions as Leonard Levy's study of Chief Justice Shaw, seems to have left historians paralyzed with fear.¹⁵

The non-lawyer American colonial historian, Warren Billings, has similarly complained that:

The attention given to the autonomy of early American law had a consequence that was as predictable as it was harmful. By stressing technicalities, legal scholars engendered the myth that only they who spoke the special language of law were capable of interpreting the law's history to others. It is quite understandable how such men, given their orientation, should seek to cloak their discipline with professional mysteries. Moreover, the nature of law like that of natural sciences, does require special skills of its historians which others obviously do not. But, by making the mysteries and skills appear to be so unusual, if not downright arcane, they erected a body of knowledge so peculiar that it seemed to say almost nothing to the uninitiated colonialist. And so, colonial historians tended to ignore their period's legal history and its sources altogether.¹⁶

To G. Edward White, a lawyer with a doctorate in American Studies, a major dilemma faces the non-lawyer historian:

Analyzing the legal source materials requires the technical skills imparted by a legal education: the majority of historians are deterred from doing research in legal materials by their inability to read the relevant sources. Taking the time to acquire the necessary skills, for an historian, is in many instances far more costly than simply choosing a less formidable area of

14. For example, F. McDONALD, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1982).

15. Horwitz, *supra* note 9, at 275.

16. Billings, *supra* note 1, at 954.

specialization.¹⁷

Hurst was also cognizant of the problem, although he believed that a formal degree in law was unnecessary:

One does not have to be a lawyer to do useful legal history; a good deal of distinguished publication by non-lawyers already demonstrates that. But the formal materials of the law—constitutions, statutes, executive and administrative rules and orders, present technical barriers to the uninitiated. Getting over these barriers calls for some special skills in dissecting legal source materials. Three years of law study are not necessary to develop the level of skills non-lawyer historians need in order to handle legal sources capably for a good many kinds of legal historical studies.¹⁸

When Friedman and Scheiber published their anthology of writings on American legal history entitled *American Law and the Constitutional Order*, the reviewer for the *American Journal of Legal History* took serious exception to the claim of the authors that the book was clear enough for a general audience of historians, despite the technicality and jargon used by lawyers. "Certainly, one can only agree with the authors about technicality and jargon," noted the reviewer. "However, some of their selections, jargonistic or not, are very heavy going. Unless the instructor is prepared to provide carefully-thought-out background material both in terms of ideas as well as basic legal terminology—excerpts such as Wechsler's 'Toward Neutral Principles of Constitutional Law,' or Charles Reich's 'The New Property' will not carry the impact they should."¹⁹

Reviews of the *Transformation of American Law* afford an excellent case study on this specific issue. To Horwitz, the method of presenting technical material was crucial to his task as he soberly pondered the dilemma: "My first aspiration in this book is to make the history of technical and obscure areas of American Law accessible to professional historians and to other nonlegally trained scholars." The problem, however, is "with choices about how technical to get." The "internal structure of a discipline" should not be sacrificed, but specialists cannot be deprived of data or the non-specialist be misled as to the "essential texture and structure of historical change within the discipline." "It has been my ardent

17. White, *supra* note 1, at 3.

18. Hurst, *Old and New Dimensions of Research in American Legal History*, 23 AM. J. LEGAL HIST. 1, 1-2 (1979).

19. The reviewer was historian Jonathan Lurie of Rutgers in 24 AM. J. LEGAL HIST. 93 (1980). Professor Lurie is the author of *THE CHICAGO BOARD OF TRADE, 1895-1905: THE DYNAMICS OF SELF-REGULATION* (1979), a study of business-government relations.

desire to reach the general historian. I am aware, nevertheless, that there are many points in this book which general readers will find too technical for their purposes."²⁰

The language problem was a recurring theme among non-lawyer reviewers of Horwitz's book. Although the problem admittedly emerged in a minor form compared to considerations of the merits of Horwitz's thesis, there was an explicit suspicion among these reviewers that the subject-matter may be too difficult for non-lawyers to grasp. In this vein, David Flaherty, a historian, prophetically remarked that "It will be a great tragedy if economic, political, and intellectual historians of antebellum America, who are ultimately the largest audience for the *Transformation of American Law*, do not make the necessary effort to assimilate the author's findings into their understanding of the era." Nevertheless, Flaherty also found the book to be technically difficult:

Horwitz is well aware of the importance of translating the mysterious science of the law into more general and accessible categories for professional historians and other non-legally trained scholars (p.xi). Yet it is debatable whether he has succeeded in his goal of general communication. While the general thesis and many of the chapters are readily comprehensible, parts of the volume, especially the lengthy chapter on developments in contract law, are very difficult reading either for practicing historians or for generally educated readers. In my view, only specialists would be able to understand and evaluate the validity of Horwitz's major discussion of how the law of contract was transformed in an increasingly commercial society by the development of extensive markets and how the equitable conception of contract law was overthrown by the will theory after 1825. The chapters treating substantive law are formidable reading.²¹

For historian Stephen Botein, speaking of Horwitz and the New Legal History:

The strength of its appeal outside the confines of law schools will probably depend upon the extent of their success in exposing the legal subject matter to scrutiny from other disciplines. However fully this program is realized, academic lawyers will continue to predominate in studying the history of American legal doctrine on the basis of both training and occupational needs.²²

20. HORWITZ, *supra* note 3, at xi. Horwitz has written an unpublished paper entitled *The Place of Justice Holmes in American Legal Thought*, which is often so technical that only lawyers could understand it; this paper is cited with the written permission of Professor Horwitz.

21. Flaherty, Book Review, 76 MICH. L. REV. 551, 554 (1978) (reviewing HORWITZ, *supra* note 3).

22. Botein, *Professional History Reconsidered*, 21 AM. J. LEGAL HIST. 60, 60-61 (1977).

Historians can assist "in writing the history of American lawyers, if not law." Another historian, Maxwell Bloomfield, concluded that "it should be required reading for law students, as well as for law professors and practitioners."²³ Erich Foner reviewed the *Transformation of American Law* for the *New York Review of Books* and similarly complained that while the study of law should not be left to lawyers:

Until recently, the history of American law has centered in law schools and has been written by and for lawyers. Apart from an interest in constitutional cases, American historians have tended to avoid the field: their feelings of inadequacy in dealing with technical legal doctrines and procedure are surpassed only by their terror when confronted with statistics.²⁴

David J. Rothman underscored the fact that legal history, even after Brandeis and Pound, remained "self-encapsulated" by refusing to consider the impact of prevailing economic and social conditions on the law. "The reasons for the lag," said Rothman, were

[n]ot especially difficult to understand. For one, it was the law professors who wrote legal history, not historians. The former were trained exclusively to analyze cases not social change. The latter, again, excluding the likes of Richard Morris or Oscar Hamdlin, found the law either too abstruse or too mysterious.²⁵

Lawyers who reviewed the *Transformation of American Law*, on the other hand, either failed to comment on the problem of technical language or tended to agree with the reviewer for the *American Bar Association Journal* that Horwitz succeeded in making his work "accessible to a multi-disciplinary readership."²⁶ One of Horwitz's own students concluded that "It does not become so technical that only lawyers versed in common law principles can read it. It is accessible not only to those who have studied *trespass de bonis asportatis* or trover or assumpsit, but also to non-lawyers who may wonder what we lawyers do."²⁷

It is ironic, nevertheless, that reviews written by lawyers con-

23. Bloomfield, Book Review, 30 VAND. L. REV. 1102, 1105 (1977) (reviewing HORWITZ, *supra* note 3).

24. Foner, *Get a Lawyer*, NEW YORK REVIEW OF BOOKS, April 3, 1977, at 38.

25. Rothman, *The Promise of American Legal History*, REVIEWS IN AMERICAN HISTORY II 16 (March 1974).

26. Edward & Veitsch, 64 A.B.A. J. 384 (1978). See also Arnold, Book Review, 126 U. PA. L. REV. 241 (1977) (reviewing HORWITZ, *supra* note 3). A non-lawyer historian in agreement is J. KETTNER, 8 J. INTER-DISCIPLINARY HIST. 392 (1977): "Non-legal scholars will benefit from his masterful explanation of technical change in legal doctrines and procedures." *Id.*

27. Goda, Book Review, 19 SANTA CLARA L. REV. 275, 275 (1979) (reviewing HORWITZ, *supra* note 3).

tained legal analysis cast in the technical language of common law rules and principles: strict liability, *quantum meruit*, trespass and trespass on the case, negligence, will theory of contract.²⁸ None of this technical analysis appeared in reviews by non-lawyer-historians. The contrast effectively begs the question of whether non-lawyer-historians are able to understand even the reviews of Horwitz, let alone the book itself. The two types of reviews were clearly addressed to two different audiences. And that is precisely the issue presently facing the New Legal History.

By significantly replenishing the field, the New Legal History has once again drawn attention to the crucial importance of a historical perspective to both the lawyer and the historian. In the past, there was certainly little doubt about this, although interest in legal history has fluctuated between boom and bust. Holmes himself insisted in *The Common Law* that "[t]he Law embodies the story of a nation's development for . . . [i]n order to know what it is, we must know what it has been and what it tends to become."²⁹ Others, such as James Barr Ames, Melvin Bigelow and James Bradley Thayer, kept the flame alive thereafter through an abiding commitment to the historical study of law. Many of them, including Holmes, carried on an extensive correspondence on this subject with Frederick W. Maitland. Their age has been described as "a classical period" of legal history. It came to an end in approx-

28. See, e.g., Williams, Book Review, 25 U.C.L.A. L. REV. 1187 (1978) (reviewing HORWITZ, *supra* note 3); LaPiana, Book Review, 13 NEW ENG. L. REV. 369 (1977) (reviewing HORWITZ, *supra* note 3); Novick, Book Review, 1977 WASH. U.L.Q. 178 (reviewing HORWITZ, *supra* note 3); Smith, Book Review, 1977 WIS. L. REV. 1253 (reviewing HORWITZ, *supra* note 3); However, both Hurst's review, 21 AM. J. LEGAL HIST. 175 (1977), and Gilmore's review, 86 YALE L.J. 788 (1977), were devoid of technical language and are certainly comprehensible to general historians. Stephen Presser's superb review, *Revising the Conservative Tradition: Towards a New American Legal History*, 52 N.Y.U. L. REV. 700 (1977), should also be intelligible to non-lawyers.

29. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459, 469 (1897):

The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of personal jests, tends to make good citizens and good men.

. . . .

The rational study of law is still to a large extent the study of history. History must be a part of the study . . . because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

Id. See also HURST, *JUSTICE HOLMES ON LEGAL HISTORY* (1964), which tells more about Hurst than it does about Holmes.

imately 1900 and it was not revived until three decades later by such scholars as Richard B. Morris, Roscoe Pound, Julius Goebel and by the prodings as well, of jurists like Felix Frankfurter.³⁰ With Hurst and the common law approach to legal history, the cycle turned favorably once again, but this time it has been decidedly energized by scholars who have been for the most part producing "lawyer's legal history."

The restoration of an historical perspective to the study of American law is a decisive first step initially necessary in order to help break down the concerns of lawyers with only the present status of rules, doctrines and argumentation which they are called upon to employ on a daily basis. Grant Gilmore, a lawyer who easily practiced the historian's craft, attacked the methodological presentism of lawyers by calling for the abandonment of the "[a]nti-historical bias which has characterized most legal writing in this century."³¹ For similar reasons, Maitland once remarked, "Lawyers do not make good historians because the legal method often conflicts with historical objectivity."³² To what degree the contrasting methodologies are responsible for the existing divergencies between law and history is a subject worthy of further debate. At this moment, the dispute is underscored by the recent controversy surrounding the failure of lawyers to complete the multi-volume history of the Supreme Court planned for by the so-called "Holmes Devise" which provoked Stanley Katz, legal historian at Princeton, to exclaim, "Lawyers are arrogant and think they can do anything, including write history."³³

The restoration of an historical perspective to legal studies, however, resolves only one horn of the dilemma. As suggested by this essay, the other dimension of the problem is to write the New Legal History in a language which is comprehensible to general historians. As other disciplines, particularly the social sciences, have enriched our understanding of the past through the introduction of new analytical modes, so, too, must there be a way to combine the results of the New Legal History with the vocabulary of general

30. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & Soc. REV. 14 (1975). On Frankfurter, see *ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER* (1966).

31. Gilmore, *Age of Antiquarius*, 39 U. CHI. L. REV. 475, 475 (1972).

32. Bridwell, *Theme and Reality in American Legal History: A Commentary on Horwitz, The Transformation of American Law, 1780-1860 and in the Common Law in America*, 53 IND. L.J. 449, 452 (1978).

33. As quoted in the N.Y. Times, May 3, 1983.

history. The historian, David Flaherty, was correct in insisting that "[w]hether one is formally trained as a lawyer or historian or both, the governing consideration is the need to write legal history as history."³⁴

While the problem is not susceptible to ready solutions, it appears that the burden must inevitably shift to lawyer-historians who alone possess the required competence to deal with the technical subject-matter of the common law to inform general history. Admittedly, like Horwitz, as lawyers they are saddled with a legacy of an enduring conceptual short hand whose only integrity may be easily compromised by facile explanations.³⁵ As historians, nevertheless, they are equally encumbered with a corresponding responsibility to speak intelligently to their colleagues. The New Legal History cannot remain either encapsulated or a prisoner of its own language. Maitland's Inaugural Lecture on his appointment to the Downing Chair of English Law in 1888 dealt with the topic of "[w]hy the history of English law is not written." His answer at that time was that the incompatibility of legal and historical points of view—different methods in outlook—prevented any significant mixture. Yet, according to Theodore F. T. Plucknett, although Maitland's first career was as a lawyer, by 1903 he had been called on to contribute to the *Cambridge Modern History*. In Plucknett's words, "Maitland had finally demonstrated that legal history is not to be confined to the faculty of law, and that the legal historian shares the whole realm of history with his fellow historians."³⁶ But that was nearly a century ago. For the present, again having demonstrated that legal history is an indispensable academic endeavor, the New Legal Historians should not fail to help expand the frontiers of historical knowledge.

34. Flaherty, *supra* note 13, at 235.

35. It is not necessary in this regard to agree totally with the conclusion of D. MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* xi (1982):

Most law can be expressed in ordinary English. Most of it is. But by the time lawyers get through mushing up ordinary English, very few English speakers and only some lawyers can recognize it. They throw in words that were headaches before the age of steam. They try to get by, stuffing law into sentences that aren't built to take the load. Instead of reflecting the rubbish and keeping the good in the language of the law, they swallow it whole. And end up with *lawsick*.

Id. See also Mellinkoff, *The Language of the Uniform Commercial Code*, 77 *YALE L.J.* 185 (1967).

36. Plucknett, *Frederick William Maitland*, 26 *N.Y.U. L. REV.* 1, 8 (1951).